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71-682

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

LARRY LEE RANES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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LARRY LEE RANES,

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PETITION FOR A WRIT OF CERTIORARI

THE PEOPLE OF THE STATE OF MICHIGAN, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on July 7, 1971.

CITATIONS TO OPINION BELOW

The original opinion of the Michigan Supreme Court dated July 7, 1971, reversing petitioner's conviction is reported as 385 Mich 234; 188 N.W. 2d 568 and attached as Appendix B hereto. The order denying petitioner's petition for rehearing was entered without opinion on September 2, 1971, attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Michigan was entered on July 7, 1971. The opinion from the Supreme Court denying rehearing was filed September 2, 1971. Jurisdiction invoked under U. S. Supreme Court Rule 19, 28 U.S.C.A. in that there are special and important reasons therefor to-wit: the Michigan Supreme Court has decided a federal question of substance not theretofore determined by this court and in part has decided the question contrary to the applicable decision of this court.

QUESTIONS PRESENTED

1. Whether the totality of circumstances surrounding the obtaining of a psychiatric examination from a confessed murderer by the State's psychiatrist who later testified in rebuttal to a defense of insanity, such testimony going to the sole question of mental capacity, violate Defendant's right to counsel and/or privilege against self-incrimination.

2. Is the testimony of a psychiatrist offered in rebuttal to a defense of insanity inadmissible where the psychiatrist examined the Defendant without the Defendant having had the opportunity to consult with an attorney prior to the examination where the result of such examination goes solely to the question of mental capacity.

CONSTITUTIONAL PROVISION INVOLVED

The applicable Constitutional provisions involved, in material part, are as follows:

> AMENDMENT V . . . nor shall be compelled in any criminal case to be a witness against himself. . . .

AMENDMENT VI. In all criminal prosecution the accused shall enjoy the right . . . and to have the assistance of counsel for his defense.

AMENDMENT XIV Sec 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

Larry Lee Ranes, on the evening of June 4, 1964, informed several people that he was the one who killed Gary Smock, a Plymouth, Michigan school teacher. This was the fourth of five killings he later admitted to. One of these persons called the Kalamazoo Police Department and Larry was arrested just before midnight June 4, 1964. At the time of his arrest, Larry had Mr. Smock's keys in his pocket and was wearing Smock's shoes, although they were a little big for him. On the way to the police station Larry Ranes also confessed to four other killings.

Shortly after arriving at the police station Ranes met in complete privacy for about one hour, with a priest which he earlier had requested. Immediately thereafter he spoke freely of the Smock killing with police officers, after being advised and warned of his constitutional rights by Sergeant Lutz. The testimony of Sergeant Lutz is as follows:

> "A. * * * And upon entry into the holding room, Defendant Ranes was sitting there and I walked over to him, extended my hand and introduced myself as Sergeant Lutz from the Michigan State Police at Fifth District Headquarters. I then introduced him to the remaining men who were with me at this time. I said to him that I wanted to talk to him, I had been informed that he had admitted to Sergeant Duncan that he had committed the murder in the case that we were investigating, and I told him that before he did so that it was incumbent upon me to advise him to just exactly what his rights would be. I first of all told him that he needn't say a word to me unless he so desired, and I further advised him that if he did,

that anything he would say to me or to the men who were with me at this particular time might and could be used against him in the event of court action. I further told him that he could be advised or be in the presence of an attorney if he so desired, and at the same time told him I thought he would need an attorney."

Larry Lee Ranes stated "I do not want an attorney" and further that he wanted to talk about the murder. There were no threats or promises made to Ranes and he wasn't hungry or sleepy.

Larry was arraigned between 3:00 and 4:00 a.m. on June 5, 1964, before Judge Clark Olmsted, at which time Ranes was again asked if he wanted an attorney. Ranes again stated he did not want an attorney. Ranes, in the opinion of Judge Olmstead, understood and comprehended the charge against him. He also appeared to be intelligent, oriented and did not show any feeble-mindedness.

After the arraignment Ranes freely and voluntarily gave a complete formal statement after being advised he was formally charged with murder, and again told he could have an attorney which he expressly refused and then stated he wanted to give a statement. The statement, which in great detail covered the facts of the robbery and brutal killing by Ranes, was introduced at time of trial with no objection by defendant.

Shortly thereafter, around 4:30 a.m., the Assistant Prosecuting Attorney, following routine procedure with a crime of this nature, called Dr. Clarence M. Schrier, Medical Superintendent of the Kalamazoo State Hospital. The Assistant Prosecuting Attorney mentioned to Ranes that Dr. Schrier was coming down and the Defendant responded that he was acquainted with Dr. Schrier and indicated that he knew why Dr. Schrier was coming down.

Just prior to the psychiatric examination Ranes stated to the Assistant Prosecuting Attorney, "you have mentioned something about an attorney, I think maybe I had better have one." The Assistant Prosecuting Attorney stated no magistrate would be available until 9:30 a.m., Ranes mentioned nothing else about an attorney. Ranes at

no time indicated, expressly or otherwise, that he did not want to take the psychiatric examination.

Dr. Schrier and his assistant, Dr. Decker, conducted an examination of Larry which lasted about two hours. During the examination Ranes was friendly, calm and quite collected. He was also polite, courteous and most cooperative. Ranes understood and gave reasonable answers to all of the questions that were asked.

A petition for the appointment of an attorney for Ranes was filed just before noon on June 5, order of appointment was signed at 1:11 p.m. on that date, and appointed counsel ultimately reached and notified at 1:30 p.m. on June 6, 1964.

At the trial, Ranes' defense was not guilty by reason of insanity. The defense never denied that Ranes committed the killing. The People did not use the testimony of the examining psychiatrists in the case in chief but only as rebuttal testimony to the expert testimony of the state paid psychiatrist of the defendant, who asserted Ranes was insane at the time of the murder. The defendant unsuccessfully objected to its admission based on a violation of defendant's constitutional right to counsel and privilege against self-incrimination. The jury found Larry Lee Ranes guilty as charged and he was sentenced on October 23, 1964.

The conviction of murder in the first degree and murder in the perpetration of an armed robbery was appealed to the Michigan Court of Appeals, Third Division. The Appeals Court, which affirmed the decision, filed their opinion on September 4, 1968, Appendix A.

On July 7, 1971, the Michigan State Supreme Court in a 4-2 decision reversed the decision of the Court of Appeals and ordered that the conviction be set aside and that the case be remanded to the trial court for a new trial (see Appendix B). Its opinion was based on the fact defendant was denied counsel at a critical stage of the proceeding.

The application for rehearing to the Michigan Supreme Court was filed on September 2, 1971, (see Appendix C).

REASONS FOR GRANTING THE WRIT

The factual situation of the case at bar (Ranes) applied to the constitutional rights afforded a criminal defendant raises important constitutional questions concerning the propriety of psychiatric examinations by other than defense retained doctors and the use of the testimony of these doctors to rebut the defense of insanity. This case, in particular, concerns the rebuttal testimony of psychiatrists who examined an already self-confessed murderer after he was advised of his right to an attorney and to remain silent but before he was appointed an attorney which it is alleged he requested. The testimony in question was used at a Pre-Miranda trial only to establish the defendant's mental condition at the time of the offense.

The highest state courts, and lower federal courts have reached differing results in coping with the problem of psychiatric testimony and the effect on it of the constitutional right to counsel and privilege against self-incrimination and the interplay of the two. There exists an important and special reason for this court to establish some guideline in this area of criminal jurisprudence.

The petitioner submits that the Michigan Supreme Court in their opinion decided important constitutional issues in a manner inconsistent with decisions of this Court. The Michigan Supreme Court relied on *Escobedo v. Illinois* (1964), 378 U.S. 478.

The Michigan Court considering the Escobedo (supra) holding as a "totality of circumstances" holding, said that under the facts in Ranes that: (1) Ranes was not effectively advised of his constitutional right to remain silent; (2) Ranes requested an attorney, and; (3) the police were involved in a process of interrogation that lends itself to eliciting incriminating statements.

It is clear all three of the above elements must be present if Escobedo is to apply (See 378 U.S. at 490-91) and the Michigan Court ruled contrary to precedent and policy of this Court not only on one element but on all three.

The rights which the Michigan Supreme Court held inadequate were given by State Police Sergeant Carl Lutz who testified that:

> "* * * And upon entry into the holding room, Defendant Ranes was sitting there and I walked over to him, extended my hand and introduced myself as Sergeant Lutz from the Michigan State Police at Fifth District Headquarters. I then introduced him to the remaining men who were with me at this time. I said to him that I wanted to talk to him, I had been informed that he had admitted to Sergeant Duncan that he had committed the murder in the case that we were investigating, and I told him that before he did so that it was incumbent upon me to advise him to just exactly what his rights would be. I first of all told him that he needn't say a word to me unless he so desired, and I further advised him that if he did, that anything he would say to me or to the men who were with me at this particular time might and could be used against him in the event of court action. I further told him that he could be advised or be in the presence of an attorney if he so desired, and at the same time told him I thought he would need an attorney."

Defendant Ranes replied "I do not want an attorney" and stated he wanted to talk about the murder.

Escobedo holds that the defendant must be "effectively warned" and does not require a ritualistic formula which must be repeated without variation in order to be effective. Even the stricter guidelines of Miranda, seem satisfied here. Accordingly, by any reasonable standard of interpretation Ranes was effectively warned of his constitutional right to remain silent. Thus the first required element of Escobedo is absent here and the result reached in Escobedo is inapplicable even if the other two elements are present. See *Crooker v. California*, 357 U.S. 433 (1957).

The other elements are not present either. Just prior to the psychiatric examination in question, but *after* he had been arraigned, advised of his constitutional rights,

and had given police a complete formal confession of his involvement in the murder, Ranes stated:

> "You have mentioned something about an attorney, I think maybe I had better have one."

The Michigan Supreme Court interpreted this to be a request sufficient to bring Escobedo into play. Its ruling is in direct conflict with *Frazier v. Cupp*, 394 U.S. 731 (1969) where it was held that the statement, "I think I had better get a lawyer before I talk anymore, I am going to get into trouble more than I am now", was not a request for counsel under Escobedo. The opinion states:

> "We do not believe that *Escobedo* covers this case. Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in *Escobedo* were unmistakably informed of their suspect's wishes; in fact, Escobedo's attorney was present and repeatedly requested permission to see his client. Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in *Escobedo*."

The Ranes' factual situation comes well within the framework of the more aggravated Frazier facts.[1]

The Michigan Supreme Court's distinction that the request was made before the examination, vis-a-vis, during

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[1] 1. Ranes was asked and expressly refused assistance of counsel three (3) times before his statement concerning counsel.

2. Ranes gave a complete formal confession of his involvement *before* making the comment about counsel.

3. Ranes at no time indicated he wanted to stop talking as was the case in Frazier.

the course of, seems void of logic and probative effect in that Ranes was interrogated by officers extensively shortly before such "request". Surely under the totality of circumstances Ranes' "request" was a passing comment and *not a request that all interrogation cease.*

Assuming, arguendo, that Ranes did request an attorney the sum total of the surrounding circumstances must be considered to determine admissibility; something which the Michigan Supreme Court failed to do. Moreover, in many reported cases it appears without significant criticism that psychiatric examinations were made prior to appointment of counsel for the defendant, or without the presence of counsel, (*State v. Whitlow* (1965) 45 N.J. 3, 210 A 2d 73, cites many of these cases), thereby indicating there is no constitutional right to counsel during the giving of a psychiatric examination for a criminal defendant who claims insanity as a defense. There are explicit holdings to this effect. *United States ex rel Wax v. Pate*, 404 F 2d 498 (7th Cir. 1969), *United States v. Baird*, 414 F 2d 700, 710-11 (2nd Cir. 1969). Of what use would the advice of counsel be? To tell his client how to answer the questions so as best to convey the impression of insanity? Did Ranes by taking the psychiatric examination do anything which his counsel could have stopped?

Lastly, it is inconceivable that a psychiatric examination conducted by a responsible physician can be the equivalent of a police process of interrogation designed to elicit in-

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[1] (Continued)—

4. Ranes never again pursued the matter of an attorney.

5. Shortly after such "request" Ranes participated in a two hour long psychiatric examination in a courteous, friendly, calm and cooperative manner.

6. Ranes was more clearly informed of his constitutional right to remain silent than in Frazier where defendant was told that anything he said could be used against him, vis-a-vis, [you] needn't say a word to me unless [you] so desire and that anything [you] say to me or the men with me could be used against [you].

7. In Frazier the questioning became vigorous and the questioning officer made false statements to get defendant to confess, where no such tactics were employed in Ranes.

criminating statements. Thus the third requisite for the application of Escobedo is also absent.

The critical concern in Escobedo, was the admission "in a state criminal trial [of] any incriminating statements elicited by the police during the interrogation". Thus it was the police "quest for a confession" while holding at bay the lawyer who would have asserted Escobedo's Fifth Amendment rights for him, and the interaction of the two Amendments (5th and 6th), not either one in isolation, which was the foundation of the holding, *Kennedy v. United States*, (D.C. Cir. 1965) 535 F 2d 462 (Burger, J.).

Petitioner submits that the constitutional privilege against self-incrimination relates to protecting the accused from the process of extracting from his own lips against his will an admission of guilt and does not extend to the exclusion of his body or of his mental condition as evidence when such evidence is relevant and material. (*State v. Phillips* (1967), 245 Or 466; 422 P 2d 670, C.F. *State v. Grayson* (1954), 239 N.C. 453; 850 Se 2d 387.)

In *U.S. v. Albright*, (CA 4, 1968) 388 F 2d 719, the court held that the trial court had the inherent power to order a psychiatric examination. That court further held that *compelling* a defendant to submit to an examination in an appropriate case does not per se violate his rights against self-incrimination. [See *Alexander v. U.S.*, (CA 8, 1967) 380 F 2d 33, and *Pope v. U.S.*, (CA 8, 1967) 372 F 2d 710 (Blackmun, J.). *Albright*, looked to the manifest purpose of the examination in determining an application to the Fifth Amendment. See also *Battle v. Cameron*, 260 F. Supp. 804, 806 (D.D.C. 1966) (Holtzhoff, J.) (denial of such an examination while at the same time placing the burden of proof on the prosecution "would be a travesty of justice").

This court's holding in *Williams v. Florida* (1970), 399 U.S. 78, makes it clear that just because the communication by a criminal defendant is "testimonial" or "incriminating", it does not automatically bring it within the ambit of the Fifth and Fourteenth Amendments. That opinion indicates that causing the defendant to choose between complete silence and presenting a defense and giving the prosecution the chance to rebut it "has never been thought

an invasion of the privilege against compelled self-incrimination". Here if Ranes did not raise the issue of insanity the testimony in question could not have been used, but when such a defense is raised, the trial ought to be open to all trustworthy evidence "which is designed to enhance the search for the truth".

If the opinion below were to stand there might well be no realistic way for the state to rebut a plea of insanity in most cases. It would be terribly unfair to allow the defendant to secure his experts and then put forth the privilege against self-incrimination for preventing like examination by the state. Such a holding would unduly frustrate the interests of justice and of effective law enforcement of the state and protect the competing interest unfairly and disportionally against the public.

It would follow that when the manifest purpose of the psychiatric examination is defendant's mental condition, and not his commission of the acts charged, as is the case here, it does not come under the constitutional privilege against self-incrimination as the Michigan Supreme Court seems to hold.

Finally, even if Escobedo is applicable, the psychiatric testimony here should still be admissible as rebuttal testimony to the defense of insanity. *Harris v. New York* (1971), 401 U.S. 222.

In *Harris* the Court stated:

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's *case in chief* is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." (Emphasis added).

The testimony in Ranes was by very qualified doctors subject to extensive cross-examination by defense counsel, and as trustworthy and competent as the psychiatric testimony of the psychiatrist for the defense, which was provided at state expense. It was moreover used not in the case-in-chief but in rebuttal. Where is there an absence of that "fundamental fairness essential to the very concept of justice"?

It is manifest that the decision reached by the Michigan Supreme Court in Ranes, which decision is in conflict with the Constitution of the United States and the opinions of this court, should not be allowed to stand as an incorrect guidepost for the administration of justice in the courts of this land.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DONALD A. BURGE
Prosecuting Attorney

JAMES C. DEVRIES
Assistant Prosecuting Attorney

APPENDIX "A"

STATE OF MICHIGAN
COURT OF APPEALS
DIVISION 3

PEOPLE OF THE STATE
OF MICHIGAN
Plaintiff-Appellee,

v. No. 329

LARRY LEE RANES,
Defendant-Appellant.

BEFORE: Burns, P.J., Fitzgerald and T. G. Kavanagh, JJ.

FITZGERALD, J.

This is an appeal from a conviction of first degree murder.

The defendant surrendered himself to the Kalamazoo police about midnight June 4, 1964, and volunteered that he was the killer of Gary Smock, the discovery of whose body had precipitated an intense manhunt for his slayer.

A magistrate was summoned promptly to the police station and the defendant was arraigned at 3:45 a.m. June 5. A formal confession was taken by the police at 4:25 a.m., following his arraignment. It appears that he was offered assistance of counsel which he declined and no question of coercion with regard to his confession is even suggested.

In the meantime, the assistant prosecutor had decided to arrange for the defendant's examination by a psychiatrist, and to this end placed a call to Dr. Schrier, then medical superintendent at the Kalamazoo state hospital. When he received the call at approximately 4:30 a.m., Dr.

Schrier agreed to examine the defendant at his (the doctor's) office later that day. After receiving the call, however, the doctor remembered the defendant as having been a former inmate of the hospital and called back to say that he would come to the jail at 8:00 a.m. for the examination.

The assistant prosecutor informed the defendant after the confession was completed that Dr. Schrier would examine him, and the defendant said: "I think maybe I'd better have a lawyer."

The defendant was informed that he'd have to wait for the appointment of counsel until a judge was available later that morning.

Dr. Schrier arrived at the jail at 8 o'clock with Dr. Decker, clinical director at the hospital, and the 2 of them proceeded to examine the defendant. The defendant conversed freely with the doctors for about 2 hours.

Later that same day, counsel was appointed and subsequently gave notice of the defense of insanity.

At the trial, by way of rebuttal to the defendant's claim of insanity, Doctors Schrier and Decker, over the objection of the defendant, were allowed to testify that from their examination of him they had formed the opinion that the defendant was sane. Conviction followed.

It is asserted on appeal that this procedure violated the defendant's constitutional rights — to counsel under the Sixth Amendment and not to be a witness against himself under the Fifth.[1]

The defendant intelligently and voluntarily waived his right to an attorney before proceeding with his confession. He was made well aware of his right to remain silent, unlike Danny Escobedo. *Escobedo v. United States* (1964), 378 US 478 (84 S Ct 1758, 12 L ed 2d 977). Upon being informed of the imminence of his examination by the psychiatrists, he changed his mind about a lawyer, saying he believed he had better have one. The stricter demands placed on waiver of counsel by the case of *Miranda v. United States* (1966), 384 US 436 (86 S Ct 1602, 16 L ed 2d 694), need not be considered here for the trial here

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[1] US Const, Am 6 and Am 5.

was held in 1964. *Johnson v. State of New Jersey* (1966), 384 US 719 (86 S Ct 1772). Thus, the expanded requirements of Miranda, and later cases, that the interrogating must cease at any one of the "critical states" of the proceedings (see *United States v. Wade* [1967], 388 US 218 [87 S Ct 1926, 18 L ed 2d 1149]), upon the demand of the accused for an attorney, even after previous waiver, need not control disposition of the present case.

The case of *Schmerber v. California* (1966), 384 US 757 (86 S Ct 1826, 16 L ed 2d 908), is one dealing with obtaining evidentiary matter from the body of the accused without his consent, and may be distinguished from the present case on that ground. *Schmerber* did not concern a totally exonerating issue advanced by the defense itself. See *Pope v. United States* (1967), 372 F 2d 710.

Here, the defendant seeks to employ the defense of mental incapacity to perform a crime, so that expert medical opinion becomes essential for both the defendant and for the people.[2] Knowing of his right to remain silent, the defendant voluntarily and freely chatted at will with the psychiatrists. His right to freedom from self-incrimination is not violated, as there was no evidence of any adverse testimonial compulsion whatsoever, as there was in *Schmerber*, wherein the Court finally permitted the nonconsensual evidence of blood samples to be admitted.

The decision of the Supreme Court of New Jersey in the case of *State v. Whitlow* (1965), 210 A 2d 763, upheld a lower court order authorizing the examination of the defendant by psychiatrists where the defendant was seeking to use the defense of mental incapacity, stating:

> "It is true, of course, that both Federal and State Constitutions give an accused the right to have the assistance of counsel in his defense * * * A psychiatric examination is simply a necessary preliminary in-

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[2] For an illuminating discussion of the entire matter of early psychiatric examination, see 54 American Bar Association Journal 566, Sadoff, "Mental Illness and the Criminal Process: The Role of the Psychiatrist".

vestigatory step to enable the State to decide whether to recommend acceptance of defendant's claim of insanity or to dispute it at trial. The limited privilege of the medical expert to inquire about the alleged crime itself, *i.e.*, only when necessary to the formation of an opinion on insanity, the sharply limited purpose for which any statements of the defendant may be used at the trial, provides sufficient safeguards against actual self-incrimination * * *.

"In none of the statutes of the various jurisdictions mentioned in footnote 1 hereof is any provision made for the presence of counsel. (Such statutes permit or require examination of an accused when defense of insanity is raised.) This is worthy of considering as indicating that none of them felt absence of counsel is a factor which might thwart a fair trial. (Citing cases.) Moreover, in many of the reported cases it appears without significant criticism that psychiatric examinations were made prior to appointment of counsel for the defendant, or without the presence of counsel. *Early v. Tinsley* and *Hughes v. United States*, 113 US App D.C. 127, 306 F 2d 287; *Edmonds v. United States*, 104 US App D.C. 144, 260 F 2d 474; *People v. Esposito*, 287 NY 389, 39 NE 2d 925; *State v. Livingston* (1958), 233 SC 400, 105 SE 2d 73." Also, see: *Pope v. United States*, *supra*.

The defendant in the present case was possessed of full awareness of his constitutional rights, alleviating much of the fear of the *Escobedo Court* concerning naive suspects, and he consented *without evidence of any compulsion* to free discussion with the psychiatrists. It may be urged that the above cases were decided prior to *Escobedo*, but this does not countervail the use of these precedents in the present case decided under the limited requirements of Escobedo which were fairly met by the people.

Affirmed.

DISSENTING

BEFORE: Burns, P.J., Fitzgerald and T.G. Kavanagh, JJ.

T. G. Kavanagh, Dissenting

Even Larry Lee Ranes is entitled to a fair trial.

To deny a person his right to the effective assistance of counsel and to compel him to incriminate himself is to deprive him of a fair trial.

As I read it, the whole point of *Escobedo v. United States* (1964), 378 US 478 (84 S Ct 1758, 12 L ed 2d 977) is that unless defendant's request for his lawyer is honored he has been denied the effective assistance of counsel in violation of the 6th Amendment and any incriminatory statement he makes thereafter is deemed to be coerced so as to violate his 5th Amendment rights, and hence may not be used against him.

The interpretation of *Escobedo, supra*, as enunciated in *Miranda*,[1] is not limited by *Johnson*[2] to a more narrow retroactivity than the original holding itself. This case clearly falls within the spirit and framework of *Escobedo*.

The importance of *Schmerber*[3] is that it differentiated between testimonial and non testimonial evidence, holding that compulsion of certain kinds of the latter does not contravene the 5th Amendment while reiterating that compulsion of any of the former does.

The answers and other communications of the defendant here with the examining psychiatrists are patently testimonial and hence within the ambit of the 5th Amendment.

The most impressive aspect of the device used here, to me, is the complete lack of justification for it. If the prose-

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[1] *Miranda v. United States* (1966), 384 US 436 (86 S Ct 1602, 16 L ed 2d 694).

[2] *Johnson v. State of New Jersey* (1966), 384 U.S. 719 (86 S Ct 1772, 16 L ed 882).

[3] *Schmerber v. California* (1966), 384 US 757 (86 S Ct 1826, 16 L ed 2d 908).

cutor was concerned about the defendant's capacity to stand trial he should have tested it under the statute. This leaves only the subsequently demonstrated desire to anticipate the defense of insanity.

This, indeed, may be laudable if lawful, but if the prosecution's case is perfected in violation of a person's rights, it vitiates the whole process of trial.

I would reverse and remand for a new trial.

APPENDIX "B"

14/April 1971
[No. 52,189]
FILED JULY 7, 1971

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN
Plaintiff-Appellee,

v.

LARRY LEE RANES,
Respondent-Appellant.

BEFORE THE ENTIRE BENCH, except T. G. Kavanagh, J.

ADAMS, J.

Larry Ranes was arrested just before midnight June 4, 1964, after telling several people he had killed schoolteacher Gary Smock. On the way to the police station, Ranes confessed to four other killings. He asked to see

a priest. Shortly after arriving at the station, he met and talked alone with a priest for about an hour. Immediately thereafter, he was informed that he had a right to an attorney by Sergeant Lutz. Ranes waived this right and admitted he committed the murder. He was arraigned between 3:00 and 4:00 a.m. on June 5, 1964. He was advised by the judge of his right to an attorney and again said he did not want one. Following arraignment, his complete formal confession was recorded by a court reporter.

At 4:30 a.m., Dr. Clarence M. Schrier, Medical Superintendent of the Kalamazoo State Hospital, was called and requested to make a psychiatric examination of Ranes. Initially, Dr. Schrier asked to have Ranes brought to him later in the morning. Shortly thereafter, he called back and said he would come to the police station to examine Ranes at 8:00 a.m. Dr. Schrier brought the Clinical Director of the Kalamazoo State Hospital, Dr. William Decker, with him for the diagnosis. About six months earlier, Ranes had been admitted to the hospital and Dr. Schrier had diagnosed him as a "sociopathic personality."

Just prior to the psychiatric examination at the police station, Ranes stated to an assistant prosecuting attorney, "You have mentioned something about an attorney, I think maybe I had better have one." The assistant prosecuting attorney denied his request, stating that no magistrate would be available until 9:30 a.m. to appoint an attorney. Drs. Schrier and Decker proceeded to conduct a two-hour psychiatric examination of Ranes. A petition for the appointment of an attorney for Ranes was filed just before noon on June 5, order of appointment was signed at 1:11 p.m. on that date, and appointed counsel ultimately reached and notified at 1:30 p.m. on June 6, 1964.

At the trial, Ranes' defense was not guilty by reason of insanity. Drs. Schrier and Decker testified for the prosecution that Ranes was sane. Defendant's attorney argued unsuccessfully that their testimony should not be allowed since it had been obtained in violation of defendant's fifth amendment right against self-incrimination and his sixth amendment right to counsel as set forth in *Escobedo v. Illinois*, 378 US 478; 84 S Ct 1758; 12 L Ed 2d 977 (1964).

Ranes was convicted of first degree murder. On appeal, the Court of Appeals affirmed in an opinion by Judge Fitzgerald, with whom Judge Burns concurred. Justice T. G. Kavanagh dissented. (13 Mich App 182). We granted leave to appeal. (381 Mich 793). The case was argued at the 1970 October term. Due to the presence of two new Justices on the Court, the case was ordered resubmitted. It was again argued at the 1971 April term on May 4, 1971.

Did the admission of testimony by psychiatrists, based on their examination of defendant after he had requested, but before he had received legal counsel violate his constitutional rights and constitute prejudicial error?

If *Miranda v. Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), applied, defendant's request for a lawyer would terminate the State's right to interrogate him until he had a lawyer appointed to advise him. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, at p. 474. *Miranda* is not retroactive. *Johnson v. New Jersey*, 384 US 719; 86 S Ct 1772; 16 L Ed 2d 882 (1966), applied *Miranda* and *Escobedo* only to cases where the trials have commenced after the decisions were announced, June 13, 1966, and June 22, 1964, respectively. Ranes' trial began September 29, 1964. The question is whether *Escobedo* compels the same result.

Escobedo dealt with a confession. In that case the opinion of the Court written by Justice Goldberg stated (pp. 490-491):

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the

> Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

In the present case, Ranes had been taken into police custody, the police carried out a process of interrogations that lent itself to eliciting incriminating statements, and the defendant requested and was denied an opportunity to consult with a lawyer.

The people contend that he was warned of his absolute constitutional right to remain silent. The testimony of Sergeant Carl W. Lutz of the Michigan State Police is as follows:

> "A. * * * And upon entry into the holding room, Defendant Ranes was sitting there and I walked over to him, extended my hand and introduced myself as Sergeant Lutz from the Michigan State Police at Fifth District Headquarters. I then introduced him to the remaining men who were with me at this time. I said to him that I wanted to talk to him, I had been informed that he had admitted to Sergeant Duncan that he had committed the murder in the case that we were investigating, and I told him that before he did so that it was incumbent upon me to advise him to just exactly what his rights would be. I first of all told him that he needn't say a word to me unless he so desired, and I further advised him that if he did, that anything he would say to me or to the men who were with me at this particular time might and could be used against him in the event of court action. I further told him that he could be advised or be in the presence of an attorney if he so desired, and at the same time told him I thought he would need an attorney."

The warning given by Sergeant Lutz was that the defendant did not have to say anything to him or the men with him. It was not the warning of his absolute con-

stitutional right to remain silent which is required by *Escobedo*. It is the claim of the people that the situation in this case is analogous to that in the case of *Frazier v. Cupp*, 394 US 731; 89 S Ct 1420; 22 L Ed 2d 684 (1969), and that defendant therefore was not denied the assistance of counsel. In *Frazier*, the defendant had begun to tell his story when he stated, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." The officer replied simply, "You can't be in any more trouble than you are in now," and the questioning session proceeded. It is to be noted that in *Frazier* the questioning had begun when the request for a lawyer was made. This is stressed by the United States Supreme Court in its opinion:

> "* * * it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in *Escobedo*."

In the present case, Larry Ranes said: "I think maybe I had better have one." His request for counsel was made before the examination began. The request was specifically denied and we can only conclude that, as a result of such denial, Larry Ranes, not having been fully informed as to his constitutional rights, submitted to the psychiatric examination. It is stated in *Escobedo* (p. 492):

> "We hold only that when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

Part of the totality of the circumstances of this case which cannot be ignored is the fact that Larry Ranes was admitted to the Kalamazoo State Hospital on December 24, 1963. While there, he was under diagnosis by Drs.

Schrier and Decker. Dr. Decker wrote, "while in the service the taunts of barracks companions and the theft of a five cent bag of potato chips were sufficient reasons to justify an attempt with butcher knives to remove the causal irritant, if necessary, by murder."

Larry Ranes was discharged from the Kalamazoo State Hospital on January 6, 1964. Five months later, at 4:30 a.m., Dr. Schrier received a call from the prosecutor and agreed to see Ranes. He asked that he be brought to his office. Dr. Schrier testified: "I got back in bed and suddenly it hit me as to what had happened, and I called back and stated that I would be down to the jail to visit him at 8:00 o'clock." Dr. Schrier brought Dr. Decker with him.

In holding that the admission of the testimony by the psychiatrists was prejudicial error and violated defendant's constitutional right to counsel under the circumstances of this case, it must be stressed that such decision is based upon the fact that defendant was refused counsel at a critical stage of the proceedings. We do not, in this case, consider when it may be appropriate for a person accused of crime to undergo examination at an insanity hearing pursuant to CL 1948, § 767.27, as amended (Stat Ann 1954 Rev § 28.967),[1] or possibly in discovery proceedings by order of the trial judge. Under the circumstances of this case, when the defendant requested counsel, we are convinced that that request should have been honored in order that defendant might have the benefit of his own legal counsel's advice with regard to any psychiatric examinations he might thereafter undergo. The situation

---

[1] This section was amended by PA 1961, No. 166, effective June 2, 1961. It provided in part:

"Such alleged insane person may be represented by counsel who may appear and take part in the proceedings, cross-examine the witnesses and produce witnesses and testimony for and on behalf of such person."

The section was repealed by PA 1966, No 266. For the current provisions relating to psychiatric examination, see MCLA §§ 767.27a and 767.27b; Stat Ann 1971 Cum Supp §§ 28.966[11] and 28.966[12].

here is much the same as when a defendant is required to submit to a show-up but yet must be afforded counsel to guarantee the fairness of the ensuing proceeding.

The Court of Appeals is reversed. The conviction is set aside and the case is remanded to the trial court for a new trial.

(s) Paul L. Adams
(s) G. Mennen Williams
(s) John B. Swainson
(s) Thomas M. Kavanagh

BEFORE THE ENTIRE BENCH, except T. G. Kavanagh, J.

BRENNAN, J. (Dissenting)

If we are to pronounce a rule of law here, and not merely voice a visceral reaction to the instant case, we ought to state the question as abstractly as possible:

Is the testimony of a psychiatrist offered in rebuttal of a defense of insanity inadmissible where the psychiatrist examined the defendant without the defendant having had the opportunity to consult with an attorney prior to the examination?

I say the answer should be no.

The psychiatric examination is not conducted for the purpose of obtaining the defendant's confession.

A confession made to a psychiatrist would be inadmissible to prove guilt.

The confession-sweating tactics which *Miranda* detailed have not been associated with medical examinations.

The doctor's testimony as to his professional opinion on the question of sanity is based upon his observation and examination of the defendant.

The fact that a psychiatric or any medical examination of a defendant may involve dialogue between the doctor and the prisoner is no more significant under the Fifth Amendment than the fact that serving the prisoner his meals may involve some dialogue with the jailer.

The psychiatrist is not concerned with the truth of what the defendant says; he is concerned with the medical significance of what the defendant says. The doctor is not looking for admissions of fact but for perception of reality.

Of what value would the advice of counsel be? Would counsel tell the defendant to refuse to be examined? Could not the doctor examine the defendant anyway? Would a lawyer advise how the questions were to be answered so as best to convey the impression of insanity? If lawyers were competent to do so, psychiatrists would be incompetent to testify.

I would affirm.

Concur in result:

(s) Eugene F. Black

(s) Thomas E. Brennan

APPENDIX "C"

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 27th day of August in the year of our Lord one thousand nine hundred and seventy-one.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
Eugene F. Black,
Paul L. Adams,
Thomas E. Brennan,
Thomas G. Kavanagh,
John B. Swainson,
G. Mennen Williams,
Associate Justices.

On order of the Court, the application for rehearing heretofore filed herein is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 2nd day of September in the year of our Lord one thousand nine hundred and seventy-one.

(s) Donald F. Winters,
Clerk.

71-682

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

LARRY LEE RANES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition but denies that the Michigan Supreme Court has in part decided a federal question contrary to the applicable decision of this Court.

QUESTIONS PRESENTED

The Peitioner fails to mention the precise basis for appeal presented to all Courts — that respondent's request for a lawyer was specifically denied — and so, respondent says the Question presented to this court is well stated by the Michigan Supreme Court:

> "Did the admission of testimony by psychiatrists, based on their examination of defendant *after he had requested but before he had received legal counsel* violate his constitutional rights and constitute prejudicial error?" (Emphasis supplied).

STATEMENT OF THE CASE

"I think maybe I had better have a lawyer." So spoke Larry Lee Ranes sometime before a psychiatric examination scheduled for 8:00 a.m., June 5, 1964. "That will have to wait until there is a magistrate available," replied the assistant prosecutor. But Municipal Judge Olmsted *was* available from shortly after 2:00 a.m., when awakened by the Kalamazoo Police Chief, until 8:00 a.m.

The assistant prosecutor could not recall warning Larry that the psychiatric examination could be used against him at trial. There followed a briefing session between the prosecutor and his psychiatric witnesses from the Kalamazoo State Hospital. And so, a two hour examination was duly had as scheduled, heedless of Larry's request for, and constitutional right to, the assistance of counsel.

This was no first meeting between Larry Lee Ranes and the prosecutor's witnesses, Dr. Clarence M. Schrier, Medical Superintendent, and Dr. William Decker, Clinical Director of the Kalamazoo State Hospital. Larry had been admitted to the Hospital on December 24, 1963, following a suicide attempt. While there, Larry informed Dr. Decker of his army experiences. Dr. Decker writes, "while in the service, the taunts of barrack companions and the theft

of a five-cent bag of potato chips were sufficient reasons to justify an attempt with butcher knives to remove the causal irritant, if necessary, by murder".

Kalamazoo State Hospital discharged Larry Lee Ranes on January 6, 1964 with a diagnosis of "sociopathic personality disturbance, anti-social reaction". Dr. Decker admitted this is a diagnosis of mental disorder. Dr. Schrier says that a sociopath is more dangerous than an overt psychotic. He now has another boy, George Bucher, whom he has termed to be "another Larry Ranes," and must be restrained. Dr. Schrier has ways of keeping a dangerous person if he chooses.

But Larry Lee Ranes was let go and Dr. Schrier is awakened by the assistant prosecutor five months later, at 4:30 a.m., June 5, 1964. Dr. Schrier agreed to see if the man who confessed to killing Mr. Smock was sane or insane, and asked that he be brought to his office. Dr. Schrier says, "I got back in bed and suddenly it hit me as to what had happened, and I called back and stated that I would be down to the jail to visit him at 8:00 o'clock". The assistant prosecutor did not know that Dr. Schrier was also going to bring Dr. Decker, Dr. Schrier also felt that it would be a good idea to have a physician called to give Larry a medical examination.

Within those five months away from the State Hospital, Larry Lee Ranes had become 19 years of age on March 20, 1964 and had killed five men. The fourth killing was Gary Smock during the evening of May 29, 1964 and the one for which he was tried. Leaving the body in Mr. Smock's trunk, Larry bought something to eat and a "coke" to wash some of the blood off Smock's car. From there, he drove to Elkhart and slept in the car with the body still in the trunk. After awakening, he killed the fifth man, returned to Kalamazoo, and abandoned the Smock car only when it stalled.

During the evening of June 4, 1964, Larry Lee Ranes informed several people that he was the one who had killed Gary Smock. One person called the authorities. As Larry left the group just before midnight to see a priest and then turn himself in, he was peacefully taken into custody by the Kalamazoo Police.

Larry had Mr. Smock's keys in his pocket and was wearing Mr. Smock's shoes, although they were a little big for him. His expression changed when he learned that Michigan did not have the death penalty and said that he wished he was in Indiana, or could go back to Indiana. Otherwise, his facial expressions didn't change and he spoke in a normal tone of voice as he discussed the several killings. One of the officers was amazed that this boy could do this and talk about it.

The Kalamazoo City Police, the Kalamazoo County Sheriff Department, the Michigan State Police, and the Kalamazoo County Prosecutor's office all continued the interrogation of Larry until arraignment between 3:00 and 4:00 a.m.

Judge Olmsted recalled that he carefully explained the meaning of a preliminary examination and inquired whether Larry understood. He testified, "I don't now recall exactly what his response was, but in looking at him and realizing he was a young person, and wondering whether I, in my own function ought to go ahead any further in the way of explanation, I said, 'Have you been in court before?' thinking if he had been in court before, he might understand these procedures. And he looked at me a minute and then he — the countenance of his face — he broke into — I can best describe it as being somewhat more than a smile and not quite a laugh — and he said, 'Yes, I have been here many times in front of you'." Judge Olmsted thought this was bizarre.

With the seemingly legal requirements achieved through arraignment, the assistant prosecutor then proceeded to obtain a formal stenographic confession between 4:00 and 4:30 a.m. At 4:30 a.m., the assistant prosecutor awakened Dr. Schrier. It is routine with the prosecutor's office to get a psychiatric examination "at any time . . . whenever one may be gotten." The second psychiatrist, Dr. Decker, was Dr. Schrier's idea. Ten to fifteen minutes later, the police from Elkhart, Indiana questioned Larry regarding photographs. Members of all Michigan law enforcement agencies took Larry with them to search his apartment. Thereafter, they removed all his clothes, except for shorts, and put him in a jail cell until the psy-

chiatrists came. Officer Doster was told to sit with Larry between 6:00 and 7:00 a.m., without any explanation as to the necessity of doing so. Still talking, Larry said that he had shot Gary Smock because he couldn't be trusted.

It was likely in this jail cell, without clothes, and between 7:00 and 8:00 a.m. that Larry Lee Ranes asked for a lawyer. The psychiatric examination took two hours, beginning at 8:00 a.m. Nothing seems to have occurred between 10:00 and 11:00 a.m., when Dr. Robert H. Hume arrived to give Larry a physical examination. The doctor found no cuts, abrasions or bruises, indicating where excessive pressure might have been applied to the boy's body. There being nothing more to obtain from Larry, he was now returned to Judge Olmsted to initiate the proceedings for appointment of a lawyer.

Defendant filed a Notice of Insanity. At trial, Kyle E. Haselden was offered as a witness for the defense. He had been a Probation Officer with the Kalamazoo County Juvenile Court since January 1, 1962 soon becoming acquainted with Larry Lee Ranes. He worked with Larry for upwards of one month, and it was his opinion that Larry Lee Ranes did not, or was not able to distinguish right from wrong.

Dr. Donald Carek was also offered as a defense witness. He is a practicing psychiatrist, an instructor on psychiatry at the University of Michigan Medical School, and consultant to the Washtenaw County Juvenile Court. Dr. Carek examined Larry Lee Ranes for about two and one-half hours on June 25, 1964, arriving at a working diagnosis that Larry showed evidence of a mental illness.

The boy was again examined by Dr. Carek for two hours on July 16, 1964. As a result of both examinations, Dr. Carek's diagnosis of Larry Lee Ranes was that he was suffering from a mental illness on May 29, 1964. Based upon a reasonable medical certainty, it was Dr. Carek's opinion that on said date, Larry Lee Ranes was unable to know right from wrong and that, secondly, he was compelled by an irresistible impulse to commit the alleged shooting. In fact, Dr. Carek believed Larry was mentally ill, capable of killing, and unable to distinguish right from

wrong at the time of attempted suicide and confinement to the Kalamazoo State Hospital.

After the defendant rested, an appropriate motion was made to suppress the forthcoming testimony of Doctors Schrier and Decker. The basis of said motion was that these doctors examined Larry Lee Ranes, for the prosecutor, outside the presence of counsel for the defendant after he had asked for a lawyer. It was more incriminating than a confession. This constituted a denial of Ranes' right to due process guaranteed by both the Michigan and United States Constitutions. The trial court denied defendant's motion.

It was Dr. Decker's opinion that Larry Lee Ranes was sane and not compelled by any irresistible impulse on May 20, 1964. Dr. Decker's testimony supplied the motive and requisite mental state for the crime of robbery.

Dr. Schrier felt that in this case there was an unresisted impulse, not an irresistible impulse and the defendant knew the difference of right from wrong when Mr. Snoek was shot. It was his opinion that Larry was sane, and does not suffer from a mental illness or mental deficiency. But, Dr. Schrier also diagnosed Larry as a sociopathic personality disturbance, anti-social reaction. Dr. Schrier remembered having said "And the fact that I said he (Larry Lee Ranes) never learned to distinguish the right from the wrong may be in his own mind, anything he wanted to do was all right, which goes along with a statement of what I want to do and when I want to do it, I will do it".

Conviction of Murder in the First Degree and Murder in the Perpetration of an Armed Robbery followed.

The majority decision and opinion of the Court of Appeals affirmed, not believing this case was controlled by *Escobedo v. Illinois* (1964), 378 U.S. 478. The Dissenting Decision and Opinion of the Court of Appeals held this case clearly falls within the spirit and framework of Escobedo.

Application for leave to appeal to the Supreme Court was granted.

On July 7, 1971, the Michigan Supreme Court reversed the Court of Appeals, set aside the conviction and remand the case to the trial court for a new trial because

defendant was refused counsel at a critical stage of the proceeding. Application for rehearing was denied.

ARGUMENT

It is not difficult to picture the scene in the Kalamazoo Police Station at 4:30 a.m., June 5, 1964. Throughout the night, experienced authorities very efficiently proceeded to assure an ultimate finding that Larry Lee Ranes killed Gary Smock. Except for Larry's preference to be in Indiana where the penalty is death, he had remained passive and polite but disinterested in the proceedings.

The evidence was beyond dispute. The confession would stand up for Judge Olmsted had been awakened to first arraign Larry. Perhaps it was Sergeant Duncan who recalled to the group how he had been "amazed". Maybe Judge Olmsted commented on Larry's "bizarre" response. Certainly, thoughts of this boy's weird conduct since his attempted suicide and release from Kalamazoo State Hospital, five months before, crept into the minds of those present.

Five senseless killings had been committed. After Mr. Smock's, Larry could eat a sandwich and wash blood off his car with a "coke" from which he drank. He could sleep in Mr. Smock's car with the body still in the trunk.

Beyond comprehension, Larry could kill a fifth person, calmly drive from Indiana to Michigan through a roadblock, and abandon Mr. Smock's body only when his car would go no further. Five days later, Larry was still going about wearing Mr. Smock's oversize shoes and uselessly carrying his car keys.

Of what value will be the evidence and a sound confession in light of all this irrational behavior, perhaps bemused the assistant prosecutor while realizing that guilt and responsibility are not separable. Something must be done to counter the defense of insanity. And it must be done before Larry eventually has counsel.

This now became a job for the "expert", Dr. Clarence M. Seltrier, who is awakened at 4:30 a.m. Sleepily, the

call appeared only as another in a long series of requests for examination and preparation for trial. But then, in his own words Dr. Schrier says, "I got back in bed and suddenly it hit me as to what happened, and I called back and stated that I would be down to the jail to visit him at 8:00 o'clock". Nothing was said about Dr. Schrier bringing another psychiatrist with him but he did feel it would be a good idea to have a physical examination.

What indeed had "hit" Dr. Schrier? He is an honorable man but also is human. Unconscious misgivings regarding his own role in the five killings by his former patient could well have prodded him back up out of bed. It would avoid criticism if Larry were to be found sane now, and on January 6, 1964 before the killings when released from the Kalamazoo State Hospital. It would be easy to accept a "Simulation of Sanity" proffered by a death-seeking boy. The Simulation of Sanity, B.L. Diamond, M.D., The Journal of Social Therapy, 3rd Quarter, 1956, Vol. 2, No. 3.

Meanwhile, Larry Lee Ranes requested and, for all practial purposes, was refused the "right to counsel". This boy was then taken at 8:00 a.m. from his cell to Dr. Schrier. The assistant prosecutor did not ask for Dr. William Decker, but he was there at Dr. Schrier's order. Two prosecution psychiatrists, sharing the unconscious motivation prompted by Larry's fateful release from their hospital, would now outnumber the indigent's sole psychiatrist at trial. No one bothered to inform Larry that what he was about to say could be used against him at trial.

And what Larry did then say was used to decisional advantage despite defendant's timely motion to suppress the fruits of this illegal examination. Example: Going to the ultimate question of responsibility which is inseparable from guilt, the prosecutor asks Dr. Schrier:

> "Q. Do you feel that the Defendant knew the difference of right from wrong at that time?
>
> A. Yes, sir.
>
> Q. Why do you say that Doctor?

A. *He admitted to us that he knew it was wrong.*" (Emphasis supplied).

Another example: This time the prosecutor is questioning Dr. Decker:

"A. Then we said, How do you feel about these things? And *he said* I don't really have any feelings about them. Said do you have any remorse? and *he said* no. Are you sad? No. Do you feel you did wrong? *I don't feel it but I know it.* (Emphasis supplied).

Q. (Mr. Schwendener interrupting): What was that Doctor, *I don't feel it but I know it?* (Emphasis supplied).

A. That's right."

And again:

"A. We asked him whether he felt he was insane and *he said no.*" (Emphasis supplied).

Not yet content even with the psychiatric testimony prepared for trial, Larry's "right to counsel" still went unheeded from 10:00 to 11:00 a.m. awaiting the arrival of Dr. Robert H. Hume. His part in the forthcoming trial would be to show that Larry hadn't been beaten into confession. Question by the prosecutor:

"Q. No cuts, abrasions or bruises indicating where excessive pressure might have been applied to his body?

A. This would be true."

Now the scene at the Kalamazoo Police Station is one of utter tranquility. The job is done, conviction is certain, and Larry's belated "right to counsel" may be honored. As was said in *Ex parte Sullivan*, D.C., 107 F.Supp. 514, 518:

"One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel now. They can't

escape the noose. There is nothing that counsel can do for them at trial.' "

The "right to use counsel at the formal trial" became a very hollow thing as, for all practical purposes, the conviction was already assured by pretrial examination. *In re Groban*, 352 U.S. 330, 334, 77 S.Ct. 510, 519, 1 L.Ed. 2d 376 (Black, J., dissenting).

In 1963 the United States Supreme Court held that the due process clause of the fourteenth amendment of the United States Constitution, U.S. Const. Amend. 14, makes applicable to all the states the guarantee of the sixth amendment of the United States Constitution, U.S. Const. Amend. 6, which provides for defendant's assistance of counsel in criminal prosecution. *Gideon v. Wainwright* (1963), 372, U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

This matter was summarized well in the case of *Rogers v. United States* (10 Cir. 1963) 325 F2d 485:

> "The right to counsel by an indigent accused of crime embraces the *right to representation at all times and during all proceedings where the fundamentals of due process are involved.* He has a right to be cautioned, advised, and served by counsel so that he will not be a victim of his poverty." (Emphasis supplied).

The critical time for Larry Lee Ranes to have had counsel was, if not before, when he asked for a lawyer. He was put off with some remark about waiting until there is a magistrate available. To insure the confession, the police had no difficulty awakening Judge Olmsted at 2:00 a.m. and getting him downtown to arraign the boy. Judge Olmsted testified that *he was available until* 8:00 a.m. when the psychiatric examination began. Larry was also deprived of "due process of law" by not being effectively warned of his absolute constitutional right to remain silent when questioned by Doctors Schrier and Decker.

The abuses to which a procedure is subject if it receives appellate approval, are amply illustrated by the facts in this very case. No one stood by Larry when he faced Doctors Schrier and Decker. No one cautioned him how easily

the words of his mouth, in that least scientific settiing of time, place and motivation, could destroy any real defense of not guilty by reason of insanity.

A real issue in this appeal is whether the constitutional "right to counsel" actually means anything. Or put another way, why bother to appoint counsel if it is all a game. A boy, barely 19 years of age in other circumstances a college freshman, obviously mentally sick, is deprived of the lawyer he requests simply by the expediency of stalling until the lawyer can do nothing for him. Meanwhile, the prosecutor is at liberty to have interested persons such as Doctors Schrier and Decker extract from the boy's mouth enough words to convict himself. Connected with the "right to counsel" is the "privilege against self-incrimination." Appellant can conceive of nothing more incriminating than for a jury to hear the boy verbalize that he is sane as it comes to them in the form of testimony from the Doctors.

For such reasons, an appropriate motion was made to suppress the testimony of Doctors Schrier and Decker. The Trial Court held that if the prosecutor doesn't have the defendant examined immediately after the arrest, the prosecutor may never obtain such examination.

To answer the Trial Court; the prosecution, if he so chooses, may simply file a petition under M.S.A. Sec. 28.967; C.L. (1948) Sec. 767.27. But, countered the Trial Court, suppose the defendant refuses to speak. In *Jett v. O'Hara*, 366 Mich. 281, 114 N.W.2d 504, the Supreme Court was not upset by defense counsel following the Trial Court's suggestion and instructing the respondent to inform the sanity commission of his name and address and to answer no further questions without the advice of counsel. The Supreme Court was concerned with the prosecutor complying with the provisions of the statute.

Furthermore, the sanity statute should not so lightly be dismissed with the legislative safeguards inherent therein. Proceeding by statute rather than by game might enable the "right to counsel" to have substance instead of mere form. Counsel would have an opportunity to make a showing of the relationship between defendant and Doctors

Schrier and Decker. The Trial Court could prudently select disinterested doctors for the psychiatric examination.

And if defendant chose to remain silent, that is his privilege. Constitutional rights cannot be defeated by delay in appointment of counsel. Although it dealt with a confession, *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, applied the same rationale to a somewhat similar set of facts by ruling:

> "(7) We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistence of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, 83 S.Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

Appellant perceives no sound basis for distinguishing an incriminating statement as to the act from an incriminating statement by the suspect verbalizing if he is sane and knows right from wrong. Applying *Escobedo v. Illinois, supra*, to this appeal, it was reversible error to use the statements elicited by Doctors Schrier and Decker against defendant at the criminal trial.

Larry Lee Ranes asked for a lawyer before being submitted to the psychiatric examination. *Escobedo v. Illinois, supra*, says:

> "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination."

Deprived of a lawyer who could advise him, Larry cannot be construed as having waived his privilege against self-incrimination. The examination that followed was a compelled violation of the privilege and testimony based thereon should have been excluded. Dr. Schrier came to the Police Station for and at the request of the prosecutor. He brought Dr. Decker. The very nature of their questions was directed towards negativing a defense of responsibility under the M'Naughten Rule, not simply determining mental illness. This line of questioning clearly indicated that the prosecutor intended to use the results of the examination exactly as with the physical examination results. And that is precisely what the prosecutor did to defeat the plea of legal insanity.

Two members of the Michigan Court of Appeals condoned the prosecutor's action in not proceeding by statute and in ignoring defendant's request for counsel. T. G. Kavanagh, Judge, dissented by holding, "This case clearly falls within the spirit and framework of Escobedo . . . The most impressive aspect of the device used here, to me, is the complete lack of justification for it."

In *United States v. Driscoll*, 399 F.2d 135 (2d Cir. 1968) the defendant was indicted for willful and knowing failure to file federal income tax returns. Prior to trial, at defense counsel's request, the district court, pursuant to 18 U.S.C. § 4244 (1964), appointed a psychiatrist to examine the defendant in order to determine whether he was able to understand the proceedings against him and could properly assist in his own defense. On the basis of this examination, conducted without the presence of counsel, the psychiatrist reported that the defendant was competent to stand trial. At trial, in rebuttal to testimony offered by the defense that Driscoll could not have acted knowingly because he was mentally incompetent, the psychiatrist was permitted to testify that Driscoll was mentally responsible at the time of the criminal acts. This testimony was based upon and included statements made by the accused during the pre-trial court-ordered examination.

In appealing his conviction the defendant maintained that the Supreme Court, acting in its supervisory role, has created a concept of fundamental "fairness" in federal

proceedings, and that the trial court, by allowing the psychiatrist to testify on the issue of mental competency at the time of the criminal act, violated the acceptable boundaries of fairness. The circuit court embraced this contention and reversed, holding that it was unfair to use the psychiatric testimony on the issue of Driscoll's mental responsibility at the time of the crime without providing defendant with adequate notice of this possibility prior to the examination.

The Second Circuit correctly decided that it was unfair to let the psychiatrist testify as to Driscoll's mental condition at the time of the criminal act. Had defendant known of the possibility of such use of the examination, he could have consulted with his attorney prior to the examination. As the court points out, only in this manner could the defendant have responded to the doctor's questioning with adequate understanding of its later significance. Moreover, had the defendant known that the results of the examination would be used at his trial on the issue of mental responsibility, he might have been entitled to certain procedural safeguards, such as the presence of counsel or a psychiatric expert on his behalf during the examination, a transcript or video tape of the examination, and the exercise of his right to remain silent. Furthermore, not realizing that the examination would be so extensively used, defendant might have unwittingly limited his answers, inadvertently providing the psychiatrist with an inaccurate picture of his entire case history. Finally, there is no countervailing reason for not notifying defendant of the possible dual use of the examination. The only effect of a failure to notify the defendant is unfair surprise.

The instant case is much stronger than *Driscoll* where defendant had counsel and the psychiatric examination was held at defense counsel's request. No one here bothered to inform Larry Lee Ranes that what he was about to say to the prosecutor's psychiatrists could be used against him at trial.

As in *Driscoll*, it is fundamentally unfair not to inform defendant that the examining physician will be permitted to testify at trial. Delaying appointment of counsel for

an indigent boy until the prosecutor's case is complete renders meaningless the whole concept of *Rogers v. United States, supra.*

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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